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No. 91-72

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

FEDERAL TRADE COMMISSION,
Petitioner,
v.
TICOR TITLE INSURANCE CO., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF AMERICAN INSURANCE ASSOCIATION, ALLIANCE OF AMERICAN INSURERS, HEALTH INSURANCE ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AND THE SURETY ASSOCIATION OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Of Counsel:

CRAIG A. BERRINGTON
MICHAEL LOVENDUSKY
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Ave., N.W.
Washington, D.C. 20036

RICHARD P. HEFFERAN
JAMES H. BRADNER, JR.
DAVID M. FARMER
ALLIANCE OF AMERICAN INSURERS
1501 Woodfield Road
Suite 400 West
Schaumburg, Illinois 60173-4980

JOHN E. NOLAN
Counsel of Record
MARK F. HORNING
DAVID A. PRICE
RODERICK L. THOMAS
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-8126
Counsel for Amici Curiae

[Additional Counsel Listed on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Woodrow E. Eno
Theresa L. Sorota
Health Insurance Association
of America
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Patrick J. McNally
National Association of
Independent Insurers
2600 River Road
Des Plaines, Illinois 60018

Robin V. Weldy
The Surety Association
of America
100 Wood Avenue South
Iselin, New Jersey 08830

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QUESTIONS PRESENTED

Does a state statutory scheme requiring administrative agency review of rate filings and rejection of all rates found to be unreasonable satisfy the "active supervision" standard for applying the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943)?

Do the principles of federalism underlying the *Parker* doctrine permit federal antitrust enforcement agencies to inquire whether state officials adequately carried out their state law responsibilities under such a scheme?

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INTEREST OF THE AMICI CURIAE

Amici curiae are insurance trade associations and an insurance rating organization whose members write property and casualty and health insurance throughout the United States. The American Insurance Association ("AIA") is a national trade organization representing 252 companies writing property and casualty insurance.

AIA companies together write more than $57 billion in premiums annually, representing 27 percent of all property and casualty insurance underwritten in the United States.

The Alliance of American Insurers ("Alliance") is a trade association of over 165 insurance companies writing property and casualty insurance throughout the United States. In 1990, member companies of the Alliance had a premium volume of nearly $22 billion, accounting for approximately 10 percent of the property and casualty insurance written in the United States.

The National Association of Independent Insurers ("NAII") is a national trade association representing the interests of over 560 property and casualty insurance companies. In 1990, NAII member companies were responsible for over $54.6 billion in direct premiums written, amounting to approximately one-quarter of the total property and casualty market in the United States.

The Health Insurance Association of America ("HIAA") is the nation's largest health insurance trade association. HIAA represents 300 members that collectively provide health care coverage to 95 million Americans.

The Surety Association of America ("SAA") consists of 650 insurers that underwrite fidelity and surety bonds throughout the United States. SAA is licensed and regulated as either a rating or advisory organization by all the states, the District of Columbia and Puerto Rico.

The states pervasively regulate the ratemaking practices of the *amici*'s member companies. In particular, to promote the availability of affordable insurance while preserving insurer solvency, most state legislatures have adopted a policy that rates shall be neither excessive nor inadequate. As an important means of implementing this policy, many states authorize insurers, through participa-

tion in state-licensed rating organizations, collectively to develop proposed rates for submission to state regulators.[1]

Reversal of the decision below could expose these companies to antitrust sanctions for conduct authorized and supervised by the states. In addition, the "active supervision" standard urged by the Federal Trade Commission would result in preemption or impairment of the rating laws which, for decades, have been in effect in a majority of the states. Since there are several varieties of state laws regulating industry cooperation on rates, many not addressed in the FTC proceeding below, *amici* desire to present their broader perspective on the types of state insurance regulation which should meet the "active supervision" standard.[2]

SUMMARY OF ARGUMENT

1. The central issue in this case is the deference which the Federal Trade Commission must pay to state laws and state administrative practices when applying the federal antitrust laws in the face of a conflicting scheme of state regulation.

The Commission invoked the federal antitrust laws against the respondent title insurers: (a) notwithstanding

[1] In contrast to property and casualty insurers, health insurers do not collectively develop rates and most states do not authorize such activity. However, a small but increasing number of states require health insurers to provide coverage for small employers, otherwise unable to obtain coverage, and to spread the risk of such coverage through statutorily-established reinsurance pools. Since the members of these pools must agree on the premiums charged for this reinsurance, the availability of *Parker v. Brown* immunity is an important protection against antitrust liability for state-authorized conduct. HIAA members face similar regulatory requirements potentially implicating the antitrust laws. These state laws are the reason for HIAA's *amicus* participation.

[2] Petitioner and respondents have consented to the filing of this brief. Copies of the parties' consent letters have been filed with the Clerk.

that their collective ratemaking was authorized by state law, as the FTC concedes (Pet. Br. at 8-9 n.7; and (b) despite state laws requiring state regulators to review the collectively-proposed rates. The Commission disregarded the existence of these laws requiring administrative supervision of rates. Instead, the FTC made its own assessment of whether state officials had, in the Commission's opinion, meaningfully reviewed rate filings. This standard for applying the *Parker* doctrine is fundamentally antithetical to our federalist system because it would permit a federal agency to assume functions properly those of state legislatures, state courts, and state administrative agencies.

2. The standard urged by the Commission would intrude on the policymaking sovereignty of state legislatures by dictating to them the types of laws they can enact for administrative supervision of rates. In this case, each of the relevant states, like a majority of the jurisdictions that authorize collective ratemaking by insurers, have adopted laws requiring: (a) that insurers file all collectively proposed rates with the state's insurance department; (b) that such rates "not be excessive, inadequate or unfairly discriminatory"; (c) that the department promptly review such filings to determine their consistency with these criteria; and (d) that the department "shall disapprove" those rates not satisfying the statutory standards. Under these regulatory regimes, state insurance officials statutorily "have" and are legally obligated to "exercise" the authority to substantively "review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick v. Burget*, 486 U.S. 94, 100-01 (1988).

The FTC nonetheless regarded these laws as insufficient for purposes of the *Parker* doctrine. It did so on the grounds that they did not require formal administrative review of every rate filing, only formal action when necessary to disapprove rates found to be unreasonable. From

this, the FTC implied the absence of a requirement for substantive review of all proposed rates.

In fact, however, these laws, on their face, *require* regulators to make a judgment about the reasonableness of all proposed rates, whether or not the filing ultimately is the subject of a formal order disapproving it as unreasonable. The distinction made by the FTC—between filings which are the subject of a formal proceeding and those which are less formally reviewed—relates only to the procedural issue of *how* the required judgment of reasonableness must be made or manifested. The Commission's distinction is simply not germane to the substantive issue posed by the "active supervision" standard: *whether* a judgment on reasonableness must be made.

The FTC's test would have serious implications for state insurance regulation. In effect, the FTC seeks to impose administrative law standards quite different from those which a majority of the states have chosen to enact. If the FTC's position were adopted, many states would have to replace their present laws with ones requiring formal agency decisionmaking in the case of every rate filing if they wished to avoid collision with the federal antitrust laws. The FTC's position thus ignores this Court's prior admonition that the *Parker* doctrine not be construed in such a way as to "reduce[] the range of regulatory alternatives available to the State." *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 61 (1985).

3. The FTC's standard would also infringe on the sovereignty of the state judiciary. Based on its erroneous interpretation of the laws of the four relevant states, the FTC disregarded the existence of these statutes. It thus afforded state officials no presumption that they had carried out their statutory duties. Rather, the Commission conducted a *de novo* inquiry to determine whether state regulators had adequately reviewed rate filings.

In essence, the FTC became a tribunal for determining whether state regulators had carried out their statutory responsibilities for reviewing rates. This approach illegitimately federalizes state administrative law issues properly within the province of state courts.

4. In addition to intruding on the functions of state legislatures and the state judiciary, the FTC's standard would result in usurpation of the role of state administrators. In several respects, the Commission would become a federal regulator of state regulators.

First, the FTC would preclude state officials from exercising their discretion to determine the degree of attention that a particular rate filing should receive. The states' goal is to prevent rates that are unreasonably high or inadequate. A state can best pursue this goal by giving more scrutiny to filings proposing significant rate increases or reductions, rather than spreading its resources more thinly to give equal or significant attention to filings having little or no impact. The FTC's standard, however, would deter the states from exercising their discretion in this manner. Under the FTC's test, the failure to subject each filing to formal administrative review might expose insurers to federal antitrust liability, thus impairing the state's regulatory jurisdiction.

Second, the FTC's standard would prevent uniform, nondiscriminatory application of a state's regulatory scheme. State insurance codes afford insurance departments exclusive jurisdiction to determine the reasonableness of rates and prohibit discrimination between similarly-situated insureds. The FTC's standard, however, would result in case-by-case preemption of the states' jurisdiction. Where a state's oversight was sufficiently active, in the FTC's opinion, it would retain its plenary jurisdiction. But where the Commission determined that the state's review of a particular filing was inadequate, the state's prior exercise of jurisdiction effectively would be nullified. Rates previously approved as reasonable could

be enjoined under the federal antitrust laws or treble damages awarded on the theory that such rates were unreasonable. Thus, in the same line of insurance, some rates previously approved by the insurance department would continue to apply to some policyholders while different rates would be charged to others for the same product, as determined by the federal antitrust enforcement agencies and federal courts.

Third, the FTC's standard would permit the Commission to substitute its judgment for that of the states on the appropriate methodologies for reviewing rates. In the proceeding below, the Commission did not regard state scrutiny of rate filings as "meaningful" where the Commission disagreed with the state concerning the information that should be supplied in support of rate filings, the components of rates that were the most significant, and the benchmarks for measuring rates that should be applied. The FTC's application of the "active supervision" standard thus creates the danger that the Commission would become a federal regulator of insurance rates and would do so through the application of standards in conflict with those selected by the states.

5. Application of the "active supervision" standard instead should be based on greater deference to state statutes. The principal concern expressed in cases such as *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) ("*Midcal*"); *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987); and *Patrick v. Burget* is that the states not give private parties blanket permission to violate the antitrust laws without subjecting their conduct to meaningful regulatory oversight. This concern is met where a state adopts, by statute or regulation, a regularized procedure for administrative agency review of rate filings.

The existence of such a statute or regulation thus should create a strong presumption of "active supervision." A presumption based on state law is consistent with proper respect for state sovereignty and the courts'

unwillingness to assume that government officials will not carry out their statutory responsibilities.

6. There remains the remote possibility that state administrative agencies may utterly fail to carry out their regulatory obligations. Consequently, although a statute or regulation should create a strong presumption of "active supervision," that presumption could be rebuttable by a showing that the state's scheme, in practice, was a sham or mere pretense.

A "sham" exception should apply, however, only where state regulatory inaction is so persistent that it is tantamount to the legal absence of an administrative scheme of regulation, as in cases such as *Midcal*. The antitrust plaintiff, accordingly, would have to demonstrate that: (a) state regulators consistently defaulted on their responsibilities for reviewing rate filings; and (b) that there were no effective state law remedies to redress regulatory inaction. This test would strike the appropriate balance between the need for effective antitrust enforcement and the states' need for latitude in deciding how to implement their regulatory policies. It also properly assigns to the states, not to the FTC, the principal role in assuring that state officials fulfill their statutory duties.

ARGUMENT

I. THE FTC'S STANDARD WOULD UNDERMINE THE FEDERALISM PRINCIPLES OF THE PARKER DOCTRINE

The "rationale of *Parker* [*v. Brown*] was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1351 (1991). The FTC has interpreted *Midcal's* "active supervision" standard inconsistently with these federalist purposes.

The *Midcal* "active supervision" test requires that "state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick*, 486 U.S. at 100-01. Where a state displaces pricing competition with a regulatory regime authorizing collective ratemaking, *Midcal* essentially requires the state to determine whether the jointly proposed rates are reasonable or otherwise in compliance with substantive state regulatory standards. *See also 324 Liquor Corp. v. Duffy*, 479 U.S. at 343-45.[3]

The approach taken by the FTC in the proceeding below, however, would impose obligations on the states going well beyond a substantive judgment on rate reasonableness or consistency with state policy. Although the FTC now implies that it was merely inquiring whether the states had made a judgment on rate reasonableness, Pet. Br. at 21-22, the record establishes that the Commission looked to considerably more than that.

The FTC actually required not only that the state make such an assessment, but that the state manifest it through some type of "affirmative determination." In particular, the FTC would compel state regulators to review each rate filing in a formal administrative hearing or similar

[3] Apart from the state action doctrine, the McCarran-Ferguson Act provides a limited exemption from the antitrust laws for conduct within the "business of insurance," if it is "regulated by State law" and does not entail "boycott, coercion, or intimidation." 15 U.S.C. §§ 1012(b), 1013(b). Because of its limited nature, however, the McCarran-Ferguson exemption may be unavailable for collective ratemaking by insurers, in which instance the state action doctrine is an alternative form of antitrust immunity. As in this case, the courts frequently consider both the Act and the state action doctrine in insurance antitrust cases. *See, e.g., In Re Insurance Antitrust Litigation*, 938 F.2d 919 (9th Cir. 1991); *Haas v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1812 (1990); *Health Care Equalization Committee v. Iowa Medical Society*, 851 F.2d 1020 (8th Cir. 1987).

proceeding culminating in a written order. If they did not, the FTC would afford *Parker* immunity to regulated insurers only where state officials could testify that they had undertaken a review which was "meaningful" in the Commission's estimation. *See, e.g.*, Pet. App. 59a, 62a.

The FTC's standard would unduly intrude on state regulatory sovereignty in three ways. *First*, as discussed in part A below, the FTC would limit the states' freedom to select the desired type of statutory scheme for substantive review of proposed rates.

Second, as discussed in part B below, the Commission's approach would not afford state officials any presumption that they had conducted a statutorily-required review of rate filings. In effect, therefore, the FTC's standard contemplates federal review of administrative agency compliance with state law—an appellate-type scrutiny of state agency action that trespasses on the function of state courts.

Third, as also discussed in part B, the Commission's test would necessitate a collateral federal proceeding to inquire into the ratemaking methodologies used by state officials and the depth or effectiveness of their review. *See* Pet. Br. at 22-24. In effect, the FTC would be transformed from an antitrust enforcement agency into a federal rate regulator.

A. The FTC's Standard Should Be Rejected Because It Would Significantly Curtail State Legislative Sovereignty

Collective ratemaking plays an important, indeed, central role in state regulation of insurance rates. This is due to the unique difficulty of pricing the insurance product. Future losses are the major element in the cost of insurance but are inherently difficult to predict.[4]

[4] This problem is repeatedly acknowledged in the legislative history of the McCarran-Ferguson Act: "The theory of insurance is the distinction of risk according to hazard, experience, and the laws of averages. These factors are not within the control of insuring companies in the sense that the producer or manufacturer may control cost factors." H.R. Rep. No. 873, 78th Cong., 1st Sess. 8-9 (1943), *quoted in Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 221 (1979).

To facilitate accurate projection of prospective loss costs, most states have authorized: (1) industrywide pooling of data on historic loss experience; and (2) industry cooperation in actuarial projection of that data into the future. *See Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. at 221 (referring to "the widespread view that it is very difficult to underwrite risks in an informed and responsible way without intra-industry cooperation"). Because rating organizations permit more accurate pricing, the states regard them as a critical means of implementing the policy that rates be both reasonable and adequate to maintain insurer solvency. The FTC's contrary characterization of collective ratemaking as "price-fixing," serving only private interests, is thus not consistent with the judgments that the states have made.

The states, however, do not merely sanction collective ratemaking without regulating the end results. In virtually all of the states that authorize collective ratemaking, proposed rates *must* be filed with insurance departments. They can be approved *only* if they are found to be "just and reasonable," not "excessive, inadequate or unfairly discriminatory," or meet other substantive statutory criteria measuring reasonableness. State ratemaking laws differ, however, on how insurance departments must make and manifest these mandatory determinations of reasonableness.

A few states require affirmative "prior approval" of all filings: before the rates can go into effect, the insurance department formally must signify, by holding a hearing or issuing an order, that they have been found reasonable.[5] In the great majority of states, however, the in-

[5] Four states use this "strict" prior approval system for automobile insurance. Three states and the District of Columbia use

surance department is required to take formal action only when it determines that a proposed rate is *un*reasonable; rates found to be reasonable can go into effect after review but without a formal order.

Over the years, the states increasingly have favored this approach as a more efficient means of implementing state regulatory policy than requiring formal administrative review of every rate filing, regardless of its significance. Any modification of a previously filed rate or rating plan, no matter how inconsequential, must be the subject of a filing. In addition, filings may effect little or no change in rate levels or seek only routine annual inflation adjustments. A detailed, in-depth review of these rates is seldom necessary to determine whether they are consistent with state policy. Consequently, statutes requiring formal action only in the case of potentially unreasonable rates free the states from a wasteful commitment of resources and permit them to focus on filings posing significant questions of consistency with state policy.

Statutes of this latter variety fall into three general categories:

—Prior approval laws with "deemed approved" clauses require substantive review of rates during a prescribed period after filing. Rates are permitted to go into effect if formally approved or, if not, they are "deemed" approved if not formally disapproved by the end of the waiting period.[6]

prior approval for commercial property-casualty insurance. Nine states use prior approval for workers' compensation insurance and two states and the District of Columbia use it for homeowner's insurance. *See* Appendix to Brief of *Amici Curiae* ("Appendix").

[6] This "prior approval" with a "deemer clause" system is the most prevalent. Thirty-four states, the District of Columbia, and Puerto Rico use this system for automobile insurance. Thirty-two states and Puerto Rico use it for commercial property-casualty insurance; twenty-eight states for workers' compensation insurance

—"File-and-use" statutes permit rates to become effective upon filing but require them to be reviewed for reasonableness after filing. Rates found to be unreasonable must be rescinded or lowered.[7]

—"Use-and-file" statutes require that rates be filed shortly after their effective date and then be reviewed. Rates determined to be unreasonable must be withdrawn or reduced.[8]

Under the Commission's analysis, however, statutes of these types would not, standing alone, satisfy the *Midcal* "active supervision" test; they would not create a presumption of state oversight; and they would not even have to be considered in the *Parker* analysis. *See* Pet. Br. at 19-20. The Commission's position is based on an interpretation of these laws as merely making rate review discretionary rather than mandatory, and as requiring merely procedural, not substantive, review.

The FTC's reading of the statutes is premised on the fact that regulators are not required to conduct hearings

(plus eight additional states for the workers' compensation assigned risk pool); and thirty states and Puerto Rico for homeowner's insurance. *See* Appendix.

[7] Sixteen states and the Virgin Islands use this system for automobile insurance, while fifteen states and the Virgin Islands use it for commercial property-casualty insurance. Four states use this system for workers' compensation insurance and fifteen states and the Virgin Islands use it for homeowner's insurance. *See* Appendix.

[8] Twelve states use this system for automobile insurance; twelve for commercial property-casualty insurance; four for workers' compensation insurance; and ten for homeowner's insurance. *See* Appendix.

Some states have variants on these basic approaches. For example, "flex" rating laws permit automatic annual inflation adjustments without prior approval but require prior approval for proposed increases in excess of the statutorily-prescribed inflation factor. "Flex" rating statutes are thus premised on legislative determinations that annual, inflation-related increases are reasonable *per se*.

or issue orders in the case of reasonable rates, but are directed to do so only in the case of rates found to be unreasonable. In the case of rates found to be reasonable, the FTC considers the failure to take formal administrative action as indicating that the rates were never evaluated. The FTC thus concludes that rates filed under the statutory systems described above can, in some cases, go into effect through the "inaction or passive acquiescence" of state officials. *See* Pet. Br. at 20.

That interpretation of these state laws is erroneous. The FTC mistakenly interprets procedural provisions dispensing with the need for formal hearings and orders as substantive provisions also dispensing with the need for a judgment on reasonableness. The plain language of these statutes, however, requires a determination of reasonableness. The wording of these laws is mandatory, not permissive. Insurers must file for approval of every proposed rate.[9] Rates "shall not" be excessive, inadequate, or unfairly discriminatory.[10] The insurance department

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[9] Insurers must also seek approval of every rating plan or schedule describing the ratemaking methodologies or risk classification systems used in setting rates. *See, e.g.*, Iowa Code Ann. § 515F.5 ("Every insurer shall file with the commissioner . . . every manual, minimum premium, class rate, rating schedule or rating plan and every other rating rule, and every modification of any of the foregoing which it proposes to use"); 24-A Me. Rev. Stat. Ann. § 2304-A (same). Insurers additionally are required to support their requests with statutorily-specified information, including statistical data on loss experience and the insurer's interpretation of that information. *Id.*

[10] *See, e.g.*, Wis. Stat. Ann. § 625.11(1) ("Rates *shall not* be excessive, inadequate or unfairly discriminatory") (emphasis added); Ariz. Rev. Stat. Ann. § 20-356(1) ("Rates *shall not* be excessive, inadequate or unfairly discriminatory") (emphasis added); Conn. Gen. Stat. Ann. § 38a-686(a) ("Rates *shall not* be excessive, inadequate or unfairly discriminatory") (personal risk insurance) (emphasis added); *id.* § 38a-665(a) ("Rates *shall not* be excessive or inadequate, as defined herein, nor shall they be unfairly discriminatory") (commercial risk insurance) (emphasis

"shall review filings as soon as reasonably possible after they have been made in order to determine whether [the filings] meet" this requirement.[11] After review, the insurance commissioner "shall" disapprove rates that are excessive.[12] State insurance codes additionally make clear that the insurance commissioner is obliged by law to fulfill those responsibilities.[13]

In sum, the FTC is simply wrong in suggesting (Pet. Br. at 30) that rates filed under the "disapproval" type of statute undergo only a ministerial review for compliance with filing requirements. Approval under the "disapproval" category of laws, no less so than under laws requiring formal approval in all cases, requires a substantive regulatory judgment about the reasonableness of the proposed rate.[14] That review, moreover, is

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added); Mont. Code Ann. §§ 33-16-101(1), 33-16-201(1)(a) ("Rates *shall not* be excessive or inadequate, as defined herein, nor shall they be unfairly discriminatory") (emphasis added).

[11] *See* Del. Code Ann. § 2506(a); *see also* Haw. Rev. Stat. Ann. § 431:14-104(i) (same); Iowa Code Ann. §§ 515A.4(3), 515F.5(2) (same); Kans. Stat. Ann. § 500.2408(1) (same); N.D. Cent. Code § 26.1-25-04(3) (same); R.I. Gen. Laws Ann. §§ 27-6-10, 27-9-9; S.C. Code Ann. § 38-73-960 (same); Utah Code Ann. § 31A-19-406(1) (same).

[12] *See, e.g.*, Iowa Code Ann. § 515F.6; Kans. Stat. Ann. § 40-929. Typically, the insurer or rating organization whose filing was rejected may then request a hearing during which the insurer "bears the burden of proving compliance with the standards established by this Act." *Id.*

[13] *See, e.g.*, Mont. Code Ann. § 33-1-311(1) ("The commissioner shall enforce the provisions of this code and shall execute the duties imposed upon him by this code."); Wis. Stat. Ann. § 601.41(1) ("The Commissioner shall administer and enforce" the state's insurance code, including rate review requirements).

[14] The FTC elsewhere has conceded that ratemaking laws of the type involved in this case require substantive determinations of rate reasonableness. In *New England Motor Rate Bureau, Inc. v. FTC*, 908 F.2d 1064 (1st Cir. 1990), the Commission stipulated, as to ratemaking laws essentially the same as involved here, that "the

mandatory, not discretionary, as the FTC wrongly suggests. *See* Pet. Br. at 19.

Regulation of rates under the "disapproval" variety of state statute therefore entails no abdication of rate regulation to private parties. State insurance departments have the power and obligation to prevent unreasonable rates from being charged to policyholders.

The FTC thus elevates form over substance in distinguishing between statutes based on the procedural manner in which state insurance departments must evidence the outcome of their scrutiny. Neither *Midcal* nor *Patrick* dictates the procedural mechanism by which a state administrative agency must undertake its review. *Patrick* in fact suggests that such procedural issues are irrelevant for state action purposes. This Court's only requirement has been that the states "have" and "exercise" the "ultimate authority" to determine whether private conduct is consistent with state regulatory policy. Statutes requiring disapproval of all excessive rates amply confer such authority on state regulators and obligate them to exercise it.

The FTC's contrary reading of these laws would have serious consequences for state regulation if the decision below is reversed. The Commission's approach would limit significantly the discretion of state legislatures to enact the type of rate review statute they conclude would best serve the state's chosen regulatory policy.

In effect, the Commission has substituted its judgment for that of the states on the types of administrative review that are effective. Indeed, the FTC's judgment—apparently in favor of a strict "prior approval" law—dif-

failure to suspend or reject a rate indicates a determination that the rate has been found to meet the [substantive] regulatory criteria of the statute. . . ." 908 F.2d at 1077; *see also* Pet. App. 113a (separate statement of Commissioner Azcuenaga).

fers from the judgment of a substantial majority of the states. Most have rejected formal administrative review of all rate filings. They have done so for two substantial reasons: (1) to minimize the impact of regulatory lag on the financial condition of insurers needing rate increases;[15] and (2) to avert wasteful expenditure of administrative resources on insignificant filings better spent on filings raising serious questions of consistency with statutory standards.

The Commission's approach, however, would reimpose on the states a type of adminstrative review which most of them, through considerable experience, have found to be insufficiently flexible. The FTC's rigid formalism would also impose a straightjacket on the states preventing them from "serv[ing] as a laboratory" and "try[ing] novel, social and economic experiments without risks to the rest of the country"—the cornerstone of federalism. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

B. The FTC's Standard Should Be Rejected Because It Would Lead to Federal Oversight of State Rate Regulation

The FTC's standard would have an equally pernicious effect on state administrative implementation of rating laws. In those states enacting the "disapproval" variety of law—and possibly even in those jurisdictions having a "prior approval" statute—the FTC would afford state officials no presumption that they had complied with their statutory duty to review rates for reasonableness. Al-

[15] A statutory scheme that permits rates to go into effect without prior approval reconciles two conflicting goals of regulators: the need to scrutinize applications, but also to avoid undue delays in the availability of justified rate increases. "If requested rate increases are justified, such lengthy delays result in inadequate rates for the period of the delay." Comptroller General, *Issues And Needed Improvements In State Regulation Of The Insurance Business* 68 (1979) (No. B-192813) (hereinafter "*GAO Report*").

though the Administrative Law Judge who initially considered the FTC's complaint applied such a presumption,[16] the Commission declined to adopt it.

Indeed, the FTC's test would appear to create a presumption of administrative irregularity. The burden would be on the antitrust defendant, as the proponent of the *Parker* defense, to show that state officials had fulfilled their regulatory responsibilities. In the absence of proof that state officials had made an "affirmative determination" with regard to each of the rate filings being challenged, the FTC conclusively would presume the absence of active supervision—without considering other aspects of the state's regulatory system or the overall history of supervision. For several reasons, this refusal to apply the presumption of administrative regularity is inconsistent with the federal respect for state regulatory sovereignty that underlies the *Parker* doctrine.

First, the FTC's "affirmative determination" test would impair state implementation of policies favoring collective ratemaking. The test offers no clear-cut standard by which insurers could determine, in advance, whether collective ratemaking would expose them to antitrust liability. Immunity would depend, not on the present existence of readily ascertainable state laws meeting the *Midcal* standards, but on the FTC's *ex post facto* assessment of the future actions of state regulators in response to the particular rate filing being challenged. Since the level of activity by state officials in response to a particular filing, let alone the outcome of the FTC's assessment, cannot be predicted in advance, insurers could never be sure whether state action immunity would apply to a particular filing. Many would be unwilling to run the resulting risk of antitrust liability, thus frustrating

[16] *See* Pet. App. 239a ("This allocation of proof is grounded on the assumption of official regularity and the concomitant notion that respondents should have no burden of proving that state officials do what they are supposed to do under their own statutes").

state policy in favor of industry cooperation. While the FTC may disagree with this policy as inconsistent with the FTC's procompetitive goals, the very purpose of the *Parker* doctrine is to reserve to the states the policy choice between competition and regulation.

The FTC's standard also would result in disruption of the uniformity of state administrative schemes of regulation. Where the FTC found state scrutiny of a filing to be insufficient, the states' regulatory jurisdiction would effectively be nullified. The federal antitrust laws could be invoked to lower rates below the levels previously determined by state regulators to be reasonable, through the award of damages or injunctive relief. This filing-by-filing preemption of state jurisdiction would lead to a fractured system of rate regulation, making it difficult for state regulators to implement, in a consistent manner, state policies mandating that rates be neither excessive nor inadequate and prohibiting discrimination. Such piecemeal exercise of federal jurisdiction to disrupt the uniformity of complex state administrative processes has long been disfavored. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

Second, the FTC's standard would impair state insurance regulation by fashioning a novel federal remedy for those alleging state administrative agency violations of state law. In the four states relevant to this proceeding, active supervision was mandated by state law. In nevertheless finding a lack of active supervision, the FTC essentially seeks to adjudicate claims that state regulators have not complied with their statutory duties.

This Court recently suggested that the *Burford* doctrine's federalism principles are most compelling where there is "a claim that a state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors. . . ." *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491

U.S. 350, 362 (1989). Indeed, it "is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1983). That is essentially what the Commission is attempting to do in this case. The Commission seeks to instruct state officials that satisfactory implementation of their rating laws must include the sort of "affirmative determinations" sought by the Commission.

Third, the FTC's standard would allow a federal agency to make qualitative assessments of state regulatory effectiveness. All too easily, such federal evaluations of state regulation would permit the FTC to substitute its judgment for that of the states on the appropriate means of regulating rates.

Under the Commission's approach, state officials would have to be subpoenaed for deposition or trial testimony on the actions they took in reviewing a particular rate filing. The FTC (or a federal judge or jury) would then assess the professional performance of those state officials. Here, for example, the FTC chose to disregard the testimony of the former chief deputy director of Arizona's insurance department, who stated that every filing during his tenure (1973-1982) was "scrutinized" by his department. Pet. App. 121a; J.A. 46-47. The FTC also found insufficiently active supervision based on the brevity of state review of filings, without taking into account that state regulatory expertise allows more expeditious scrutiny of rate filings than in the case of those not versed in the field, such as the FTC's staff. A basic flaw in the FTC's standard, therefore, is that it presumes the Commission to have equal or greater expertise than state insurance departments in determining what constitutes effective review of a rate filing.

In addition to ascertaining whether state regulators gave sufficient attention to filings, the Commission evaluated the

substantive standards which they applied. For example, the FTC found a lack of active supervision in Connecticut and Wisconsin based, in part, on the failure of those states to regulate what the FTC regarded as an important element of rates (agents' commissions). *See* Pet. App. 57a, 59a, 62a. The FTC found a lack of active supervision in Arizona and Wisconsin because those states used historically prevailing rates as benchmarks for assessing rate filings. *See* Pet. App. 60a, 63a-64a, 68a.

Indeed, the Commission's evaluation of state regulation improperly imposed the policies of federal antitrust law upon the states. With respect to Connecticut, Wisconsin, and Idaho, the Commission held that state regulators did not adequately supervise because they allegedly gave minimal review to endorsements and amendments that did not "involve generalized rate increases." Pet. App. 60a (Connecticut). The rationale for this conclusion was that "even if the economic effects of these changes were not substantial, there is no *de minimis* exception to the antitrust laws." Pet. App. 63a (Wisconsin); *see also* Pet. App. 73a (Idaho).

It is true that, under the FTC and Sherman Acts, price-fixing is unlawful regardless of whether the prices jointly set by competitors are reasonable or unreasonable. That is not the policy of the states in the case of insurance, however. Their goal is reasonable rates, whether set collectively or individually.

Consequently, the state's only regulatory obligation is to determine whether proposed rates are consistent with that policy, not whether they involve concerted action within the meaning of the federal antitrust laws. *See Midcal*, 445 U.S. at 105. Contrary to the FTC's conclusion, therefore, it is fully consistent with state regulatory policy to afford *de minimis* review to rate filings that do not have a significant effect on consumers.[17]

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[17] Not surprisingly, a study by the General Accounting Office found that "[t]he amount of time spent [by state insurance regu-

The FTC's engrafting of antitrust standards on state insurance regulation thus demonstrates the inherent danger of federal evaluations of state regulatory effectiveness. Such "ex post facto . . . assessment[s]" of state regulatory decisions carry with them the risk that the FTC's perception of the "public interest" will differ from that of the states. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1352 (1991). The very purpose of the *Parker* doctrine, however, is to reserve to the states such judgments about the appropriate form of economic regulation. The Commission's "active supervision" standard should thus be rejected because of its potential to " 'compromise the States' ability to regulate their domestic commerce.' " *Id. See also Duquesne Light Co. v. Barasch*, 488 U.S. 299, 316 (1989) (even federal constitutional guarantees should be applied so that "within broad limits . . . the States [are] free to decide what ratesetting methodology best meets their needs in balancing the interests of the utility and the public").

Finally, if the FTC's "affirmative determination" standard is adopted, the interests of neither state regulatory sovereignty nor the federal antitrust laws would be served. In *Southern Motor Carriers*, the Court held that the state action doctrine should apply not only where the state totally eliminates competition, such as by compelling collective ratemaking, but also where the state substantially displaces competition without completely eradicating it, such as by authorizing collective ratemaking but allowing individual company filings. The Court's reasoning was that conditioning *Parker* immunity on the total displacement of competition would unduly confine state regulatory discretion while also being inconsistent with the policies of the Sherman Act:

> The *Parker* doctrine represents an attempt to resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace. A compulsion requirement is inconsistent with both values. It reduces the range of regulatory alternatives available to the State. At the same time, insofar as it encourages States to require, rather than merely permit, anticompetitive conduct, a compusion requirement may result in *greater* restraints on trade. We do not believe that Congress intended to resolve conflicts between two competing interests by impairing both more than necessary.

Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 61 (1985).

The FTC's suggested standard here could have the same perverse effects that caused the Court to reject a compulsion standard in *Southern Motor Carriers*. If the states are forced to make an "affirmative determination" on every rate filing, regardless of the filing's significance, the states may be unable to commit the additional necessary resources. If so, the states may be compelled to eliminate the option, presently available to insurers in most jurisdictions, of seeking approval of individual company rates different from the collective rates filed by rating organizations. Ironically, therefore, the FTC's standard could lead to a diminution in competition, as well as an undue restriction on state autonomy.

C. The FTC Is Not Entitled to Deference on Findings Relating to State Law and State Action

In arguing that the federal courts must defer to its "factual" findings concerning the "active supervision" standard, Pet. Br. at 27-31, the Commission erroneously equates the state law questions relevant to the *Parker* doctrine with the factual questions committed to the FTC's expertise.

The state officials examined below were not fact or expert witnesses testifying about the conduct of respondents or about economic issues pertinent to the antitrust

lators] on individual rate filings generally depended on the complexity and impact of those filings." *GAO Report*, *supra* note 15, at 62.

determinations as to which the FTC has responsibility. They were testifying, in their capacity as representatives of a sovereign, on state law and state actions that are not subject to the FTC's antitrust jurisdiction at all.

More specifically, state regulators testified about two categories of state regulatory issues. One was the meaning of state rating laws. This is clearly an area where deference should be paid to state officials, not to the Commission, and one that involves quintessentially legal questions which the appellate courts can review *de novo.*

Second, state officials testified as to the actions they took on rate filings. On these issues the FTC must accept the testimony of state regulators and cannot evaluate it based on "the credibility of witnesses." Pet. Br. at 28. To do so would be to apply *Parker* in a manner that this Court recently has rejected: "the sort of deconstruction of the governmental process and probing of the official 'intent' that we have consistently sought to avoid." *Omni*, 111 S. Ct. at 1352. The court below was thus fully justified in rejecting FTC findings based on federal assessments of the veracity of state regulators.

II. THE EXISTENCE OF A STATUTORY MECHANISM FOR SUBSTANTIVE REVIEW OF RATE FILINGS SHOULD CREATE A STRONG PRESUMPTION OF "ACTIVE SUPERVISION"

In this case, the Commission concedes the existence of state laws authorizing collective ratemaking by title insurers. The Commission further acknowledges the existence of an administrative scheme for regulation of those rates; the Commission disputes only the efficacy of that scheme. In this situation, where the states incontestably have established administrative schemes of price regulation, the *Midcal* "active supervision test" should principally be based on whether the applicable statutes provide for the type of substantive review required by *Midcal* and *Patrick v. Burget.*

If state laws do so on their face, there should be a strong presumption of active supervision. Independent

proof of actual state regulatory action should be required, as part of the antitrust defendant's *prima facie* case, only in the absence of state laws evidencing that state regulators "have" and are obligated to "exercise" control over private conduct.

From an antitrust standpoint, the existence of a statutorily-mandated process for substantive review of state-authorized anticompetitive conduct indicates that the state is not merely giving blind permission for what is "essentially a private price-fixing arrangement." *Midcal*, 445 U.S. at 106. From a state regulatory standpoint, a statute-based presumption takes appropriate account of the policy of federal deference to state regulation upon which the *Parker* doctrine is founded. More broadly, a presumption of active supervision would be consistent with the "presumption against finding preemption of state law in areas traditionally regulated by the states." *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989). Since insurance regulation has long been an area of state supremacy,[18] it is thus appropriate to shield state laws governing review of rate filings against federal antitrust preemption.

A presumption of active supervision is also supported by the conceptually similar presumption of regularity accorded to administrative decisionmaking.[19] In the ab-

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[18] In the McCarran-Ferguson Act, Congress statutorily has announced a general national policy that federal statutes not specifically relating to the "business of insurance" should not be construed to "invalidate, impair, or supersede" state insurance laws and a more specific policy that the federal antitrust laws not apply to conduct "regulated by State law." 15 U.S.C. § 1012.

[19] The presumption of regularity has enjoyed a long history. *See, e.g., INS v. Miranda*, 459 U.S. 14, 18 (1982); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971); *R. H. Stearns Co. v. United States*, 291 U.S. 54, 63 (1934); *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926); *Weyauwega v. Ayling*, 99 U.S. 112, 119 (1879). The presumption of regularity equally may be invoked in favor of state administrative officials. *See, e.g., Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 535 (1938); 29 Am. Jur. 2d *Evidence* § 172, at 216 (1967).

sence of evidence to the contrary, there is a "very strong presumption" that public officers have "properly discharged the duties of their office and performed faithfully those matters with which they are charged."[20] 29 Am. Jur. 2d *Evidence* § 171, at 212-13 (1967). Courts also presume "that public officers have not culpably neglected or violated their official duties." *Id.* (footnotes omitted).

Finally, a standard that looks to the existence of a statutorily-mandated review process provides more clear-cut guidance to state regulators and regulated entities than does a *post hoc*, fact-based inquiry into the particular actions of particular state officials with regard to particular rate filings.

A presumption in favor of active supervision would, however, be rebuttable, not conclusive. This is to allow for the exceptional possibility "that the statutory provisions here under review were mere pretense." *FTC v. National Casualty Co.*, 357 U.S. 560, 564 (1958). That is, although a state statute or regulation requiring review of rate filings would create a strong presumption of active supervision, that presumption could be overcome by evidence that the regulatory regime was a complete "sham" allowing private cartel-type arrangements to operate free from state oversight.

Precedent for this approach lies in the similar "sham" exception to the *Noerr-Pennington* doctrine which, as this Court recently has recognized, is complementary to the *Parker* doctrine. *See Omni*, 111 S. Ct. at 1353, 1355. The shared concept of the two doctrines is that restraints of trade effected through governmental action are not reachable by the antitrust laws, even if prompted by proposals from private parties.

Under *Noerr*, once it is established that the challenged conduct on its face constitutes petitioning of the government, there is a strong presumption of immunity. Under *Noerr's* "sham" exception, the burden then shifts to the plaintiff to demonstrate that its injury was not occasioned by the government's decisionmaking, but rather by the defendant's invocation of the governmental process as a subterfuge for a private restraint of trade. *See Omni*, 111 S. Ct. at 1354-55.

[20] This presumption is based upon the regulatory expertise of the administrators, as well as "a general belief that most government officials act with integrity." C. Koch, *Administrative Law and Practice* § 1.28, at 48-49 (1985).

A "sham" exception to *Parker* would operate in much the same way and have much the same purpose. Once the state statutorily has authorized the challenged restraint, and by statute or regulation subjected it to substantive review, immunity should be available except upon a showing by the antitrust plaintiff that the state's role was a "mere pretense."

Proof of a "sham" regulatory regime, however, should not consist of a mere showing that state regulators erroneously assessed the reasonableness of the rates proposed in the particular filing; did not make an "affirmative determination" of reasonableness; or did not conduct the statutorily-required review of the filing in question. *Parker* immunity is available irrespective of whether regulatory determinations by state officials were "substantively or even procedurally defective." *Omni*, 111 S. Ct. at 1349. In addition, many rate filings require only *de minimis* review because they have no significant impact on consumers. Failure to actively scrutinize those filings thus does not raise a danger that the rates will be inconsistent with state regulatory policy. Consequently, where, by statute or regulation, proposed rates must be reviewed by the administrator, the *Parker* doctrine should not then "allow plaintiffs to look behind the actions of state sovereigns to base their claims. . . ." *Id.* at 1353.

Rather, the presumption created by a statutory mechanism for rate review should be rebuttable only under a twofold test. First, it would have to be shown that regulators, in the case of filings relating to the applicable line of insurance, never conducted the statutorily-required reviews. Only persistent, widespread inaction, amounting

to the total absence of an administrative scheme of regulation as in cases such as *Midcal*, should justify overturning the presumption of active supervision. Thus, a showing that regulators have, in the past, rejected rate filings that were unreasonable, or demonstrated a "basic level of activity," should be enough to defeat any assertion that the state's chosen regulatory regime is a "sham." *See, e.g., New England Motor Rate Bureau, Inc. v. FTC*, 908 F.2d at 1077 (finding of active supervision based on FTC stipulation that "unreasonable rates [are] rejected" by state regulators).

Second, the "sham" exception should be applied only where there are no effective state law remedies to cure inaction by state insurance departments. The federal courts traditionally have been reluctant to create federal remedies for unlawful state action where adequate state law remedies are available. *See, e.g., Parratt v. Taylor*, 451 U.S. 527, 542-44 (1981).

State law remedies are also relevant because review of rates after initial approval of filings can constitute active supervision. For example, most states permit policyholders to file complaints with state insurance commissioners alleging unreasonably high rates. The commissioner is then authorized to conduct investigations, with subpoena power.[21] This administrative remedy does not have the drawbacks that the government ascribes to mandamus

[21] *See, e.g.*, Ariz. Rev. Stat. Ann. § 20-367; Conn. Gen. Stat. Ann. § 38a-678; Mont. Code Ann. §§ 33-16-204; 33-16-205; 33-16-206. Policyholders aggrieved by the insurance department's decision typically have the right of appeal to state court. *See, e.g.*, Conn. Gen. Stat. Ann. §§ 4-183, 4-184; Mont. Code Ann. § 33-16-113.

In addition, insurance commissioners invariably are required to conduct periodic examinations of rating organizations to monitor their compliance with rating laws. *See, e.g.*, Ariz. Rev. Stat. Ann. § 20-370; Conn. Gen. Stat. Ann. § 38a-677; Mont. Code Ann. § 33-16-106 (1991). Insurance commissioners also are empowered to review the rating organizations *sua sponte*. *Id.* The insurance commissioner may take appropriate steps to prohibit or otherwise correct any ratemaking practice inconsistent with the substantive criteria of the state's rating laws.

(Pet. Br. at 25-26): (1) administrative review is not an extraordinary remedy strongly disfavored; (2) no expenditure of consumer resources is required to prosecute the action, since the commissioner conducts the investigation; (3) relief is not piecemeal, benefitting only a few consumers, since the commissioner may apply any finding of rate unreasonableness generically to all policyholders; and (4) the administrative proceeding can afford retroactive relief in the form of rate adjustments.

Further, many states give notice of rate filings, especially by rating organizations, to consumer representatives, such as statutorily-designated "public advocates." Typically, such consumer representatives are authorized by statute to request rate hearings.[22] The fact that a public advocate has elected not to contest a filing is additional evidence of rate reasonableness. Finally, some states require or authorize annual or retrospective review of rates, that is, determinations by the insurance commissioner whether rates previously or currently in effect were or are excessive, with the power to order revisions, refunds or credits against future premiums.[23]

These post-approval mechanisms are relevant to the "active supervision" issue for two reasons. First, they evidence the states' continuing power to "monitor market conditions" and to undertake a " 'pointed reexamination' " of regulatory programs. *See 324 Liquor Corp. v. Duffy*, 479 U.S. at 345. Second, supplemental mechanisms for supervision of rates act as a corrective to state regulatory inaction on the original rate filing.

A "sham" exception thus would strike a proper balance between respect for state sovereignty and protection against state laws which throw "a gauzy cloak of state involvement" over unregulated restraints of trade. *Midcal*, 445 U.S. at 106. In this case, on their face, the laws of the relevant states require determinations of reason-

[22] *See, e.g.*, 24-A Me. Rev. Stat. Ann. § 2374(2); N.J. Stat. Ann. § 52:27E-18.

[23] *See, e.g.*, Iowa Stat. Ann. § 515F.6.

ableness and hence there should have been a strong presumption of active supervision. The Commission failed to overcome that presumption, because: (1) there was a "basic level of activity" demonstrating meaningful implementation of state rating laws; and (2) the Commission failed to demonstrate the absence of alternative supervisory mechanisms over rates which could have redressed any state inaction on initial rate filings.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

JOHN E. NOLAN
Counsel of Record
MARK F. HORNING
DAVID A. PRICE
RODERICK L. THOMAS

STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-8126
Counsel for Amici Curiae

Of Counsel:

CRAIG A. BERRINGTON
MICHAEL LOVENDUSKY
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Ave., N.W.
Washington, D.C. 20036

RICHARD P. HEFFERAN
JAMES H. BRADNER, JR.
DAVID M. FARMER
ALLIANCE OF AMERICAN INSURERS
1501 Woodfield Road
Suite 400 West
Schaumburg, Illinois 60173-4980

WOODROW E. ENO
THERESA L. SOROTA
HEALTH INSURANCE ASSOCIATION OF AMERICA
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

PATRICK J. MCNALLY
NATIONAL ASSOCIATION OF INDEPENDENT INSURERS
2600 River Road
Des Plaines, Illinois 60018

ROBIN V. WELDY
THE SURETY ASSOCIATION OF AMERICA
100 Wood Avenue South
Iselin, New Jersey 08830

Date: December 23, 1991

APPENDIX

APPENDIX

STATE RATING SYSTEMS *

I. AUTOMOBILE

(1) Strict Prior Approval

Delaware
Nevada
New Hampshire
Oklahoma (if rate change exceeds 15%)

(2) Prior Approval with Express Deemer

Alabama
Alaska
Arkansas
California
Colorado (assigned risk)
Connecticut (personal and residual market rates in a noncompetitive market)
District of Columbia
Georgia (private passenger)
Hawaii
Iowa (in a noncompetitive market)
Kansas
Kentucky (in a noncompetitive market, or if rate change exceeds 25% within 12 months, or if residual market rate)
Louisiana
Maryland
Michigan (excluding private passenger in a competitive market)
Mississippi
Missouri (commercial casualty if rate change exceeds 25% annually)

* This appendix is based upon a statutory review conducted by the American Insurance Association.

Nebraska
New Mexico
New York (in a noncompetitive market)
North Carolina (private passenger)
North Dakota
Ohio (commercial casualty in a noncompetitive market)
Oklahoma
Oregon (commercial liability specified by regulator)
Pennsylvania
Puerto Rico
Rhode Island
South Carolina
South Dakota (if closer supervision is necessary)
Tennessee (personal coverage)
Vermont (in a noncompetitive market)
Virginia (residual market and uninsured coverage)
Washington
West Virginia
Wyoming (in a noncompetitive market)

(3) **File and Use**

Arizona (in a noncompetitive market)
Colorado (rating data)
Connecticut (in a competitive market)
Florida
Georgia
Indiana
Maine
Michigan (private passenger in a competitive market)
Minnesota
New York (informational filing in a competitive market)
North Carolina (commercial)
Ohio (commercial in a competitive market and all other auto)

Oregon
South Dakota
Utah (in a noncompetitive market)
Virginia (in a competitive market file on or before effective date; in a noncompetitive market file 60 days before effective date)
Virgin Islands

(4) **Use and File**

Arizona (in a competitive market)
Florida
Idaho
Illinois (private passenger, taxicab and motorcycle rates)
Iowa (in a competitive market)
Kentucky (in a competitive market)
Missouri
New Jersey (commercial)
Tennessee (commercial)
Utah (in a competitive market)
Vermont (in a competitive market)
Wisconsin

(5) **Flex-Rating**

New Jersey (private passenger)
New York (commercial)
Texas (state board of insurance sets benchmark and flex band)

II. PROPERTY-CASUALTY GENERALLY

(1) **Strict Prior Approval**

Delaware
District of Columbia (property)
Nevada
Oklahoma (if rate change exceeds 15%)

(2) **Prior Approval With Express Deemer**

Alabama
Alaska
Arkansas
California
Connecticut (personal lines in a noncompetitive market)
Florida
Hawaii
Iowa (in a noncompetitive market)
Kansas
Kentucky (in a noncompetitive market, or if rate change exceeds 25% within 12 months, or if residual market rate)
Louisiana
Maryland
Michigan
Mississippi
Missouri (commercial casualty if rate change exceeds 25% annually)
Nebraska
New Jersey
New Mexico
New York (in a noncompetitive market)
North Dakota
Ohio (property and commercial casualty in a noncompetitive market)
Oklahoma
Oregon (commercial liability specified by regulator)
Pennsylvania
Puerto Rico
Rhode Island
South Carolina
South Dakota
Tennessee
Vermont (in a noncompetitive market)
Washington
West Virginia
Wyoming (in a noncompetitive market)

(3) **File and Use**

Arizona (in a noncompetitive market)
Colorado (rating data)
Connecticut (in a noncompetitive market)
Florida
Georgia
Indiana
Maine
Massachusetts
Minnesota
New York (informational filing in a competitive market)
North Carolina
Ohio (casualty)
Oregon
Utah (in a noncompetitive market)
Virginia (in a competitive market file on or before the effective date; in a noncompetitive market file 60 days before the effective date)
Virginia Islands

(4) **Use and File**

Arizona (in a competitive market)
Florida
Idaho
Illinois (liquor liability)
Iowa (in a competitive market)
Kentucky (in a competitive market)
Missouri
Tennessee (commercial)
Texas
Utah (in a competitive market)
Vermont (in a competitive market)
Wisconsin

III. WORKERS' COMPENSATION

(1) Strict Prior Approval

Delaware
District of Columbia
Florida
Minnesota * (commissioner may require approval in a noncompetitive market)
New Hampshire
New Jersey
New York
Oklahoma (if rate change exceeds 15%)
Tennessee

(2) Prior Approval With Express Deemer

Alabama *
Alaska *
Arkansas
Colorado *
Connecticut *
Hawaii *
Idaho *
Illinois (in a noncompetitive market)
Indiana *
Iowa
Kansas
Kentucky * (in a noncompetitive market)
Louisiana *
Maryland *
Massachusetts
Mississippi
Nebraska *
New Mexico *
North Carolina

* In these states the bureau files loss costs. Nevada, North Dakota, Ohio, Washington, West Virginia, Wyoming, Puerto Rico and the Virgin Islands are state monopoly funds and therefore do not provide private insurance.

Oklahoma
Oregon *
Pennsylvania
Rhode Island *
South Carolina *
South Dakota
Vermont * (in a noncompetitive market)
Virginia
Wisconsin

(3) File and Use

Arizona
Michigan *
Minnesota * (in a noncompetitive market)
Utah

(4) Use and File

Illinois (in a competitive market)
Kentucky * (in a competitive market)
Minnesota * (in a competitive market)
Vermont * (in a competitive market)

IV. HOMEOWNERS

(1) Strict Prior Approval

Delaware
District of Columbia
Nevada

(2) Prior Approval With Express Deemer

Alabama
Alaska
California
Connecticut (in a noncompetitive market)
Florida
Hawaii
Iowa (in a noncompetitive market)

Kansas
Kentucky (in a noncompetitive market, or if rate change exceeds 25% within 12 months, or if residual market rate)
Louisiana
Maryland
Michigan (in a noncompetitive market)
Mississippi
Nebraska
New Jersey
New Mexico
New York (in a noncompetitive market)
North Carolina
North Dakota
Ohio
Pennsylvania
Puerto Rico
Rhode Island
South Carolina
South Dakota
Tennessee
Vermont (in a noncompetitive market)
Virginia (residual market)
Washington
West Virginia
Wyoming (in a noncompetitive market)

(3) File and Use

Arizona (in a noncompetitive market and assigned risks)
Colorado (rating data)
Connecticut (in a competitive market)
Florida
Georgia
Indiana
Maine
Massachusetts

Michigan (in a competitive market)
Minnesota
New York (informational filing in a competitive market)
Oklahoma
Oregon
Utah (in a noncompetitive market)
Virginia (in a competitive market file on or before effective date; in a noncompetitive market file 60 days before effective date)
Virgin Islands

(4) Use and File

Arizona
Florida
Idaho
Illinois (dwelling fire and allied lines)
Iowa (in a competitive market)
Kentucky (in a competitive market)
Missouri
Utah (in a competitive market)
Vermont (in a competitive market)
Wisconsin

(5) Flex-Rating

Texas (State Board of Insurance promulgates the benchmark rate and the flex band)